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In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

TRI-STATE MOTOR TRANSIT CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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49pp

QUESTION PRESENTED

Whether the Hobbs Act, 28 U.S.C. 2341 *et seq.*, bars relitigation of the validity of an agency rule after the rule has been upheld by another court of appeals and the statutory 60-day period for seeking judicial review has expired.

PARTIES TO THE PROCEEDING

Respondents here include, in addition to Tri-State Motor Transit Co., the American Trucking Associations, Inc., and the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America, Inc., an intervenor below. The Denver & Rio Grande Western Railroad Company also participated below as an intervenor.

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No.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

TRI-STATE MOTOR TRANSIT CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Interstate Commerce Commission and the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 739 F.2d 1373. The decisions of the Interstate Commerce Commission (App., *infra*, 11a-15a, 16a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 9a) was entered on August 3, 1984. A petition for rehearing was denied on October 26, 1984 (App.,

infra, 10a). On January 15, 1985, Justice Blackmun entered an order extending the time for filing a petition for a writ of certiorari to and including March 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Administrative Orders Review Act of 1950 (or Hobbs Act), 28 U.S.C. 2341 *et seq.*, are set forth at App., *infra*, 22a-28a.

STATEMENT

1. The Administrative Orders Review Act of 1950, 28 U.S.C. 2341 *et seq.*, known as the Hobbs Act, vests jurisdiction to review orders of six federal agencies,[1] including the Interstate Commerce Commission (ICC), in the courts of appeals (28 U.S.C. 2342).[2] The Act also provides that a party aggrieved by a final order by one of the specified agencies "may, within 60 days after its entry, file a petition to re-

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[1] In addition to those specified in the statute, orders of several other federal agencies are covered by the judicial review provisions of the Hobbs Act. 8 U.S.C. 1105a(a) (Immigration and Naturalization Service deportation orders), 39 U.S.C. 3628 (Postal Rate Commission orders), 50 U.S.C. 167h(b) (Department of Interior orders), 31 U.S.C. 755 (Personnel Appeals Board of the General Accounting Office orders).

[2] The orders of the Interstate Commerce Commission were, prior to 1975, reviewed by three-judge district courts, with appeals directly to this Court, under the Urgent Deficiencies Appropriation Act of 1913, ch. 32, 38 Stat. 208 *et seq.*, and the Expediting Act of 1903, ch. 544, 32 Stat. 823 *et seq.* In 1975, Congress amended the Hobbs Act to bring the ICC under that system of judicial review. Pub. L. No. 93-584, 88 Stat. 1917 *et seq.*

view the order in the court of appeals wherein venue lies." 28 U.S.C. 2344. The agency is directed to "file in the office of the clerk the record on review as provided in section 2112." 28 U.S.C. 2346. The Act then provides, as follows, 28 U.S.C. 2349(a):

> The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

2. In January 1983, the ICC issued a final policy statement in Ex parte No. MC-156, *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (served Jan. 6, 1983), abolishing the so-called "special circumstances" doctrine in the licensing of rail-affiliated motor carriers.[3] The American Trucking

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[3] The "special circumstances" doctrine was a longstanding exception to the national policy to protect motor carriers from encroachment by railroads. Under that exception, the ICC could grant to a railroad unrestricted motor carrier operating authority if it was shown that (1) the grant would not restrain competition, and (2) the public interest required the proposed service which existing carriers had not offered except where it suited their convenience. See *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960).

Following enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, and the Staggers Rail Act of 1980, Pub. L. No. 94-448, 94 Stat. 1895 *et seq.*, which loosened regulatory strictures on the trucking and rail indus-

Associations, Inc. (ATA) (and several of its affiliated conferences and associations), and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) sought review of the ICC's decision in the United States Court of Appeals for the Fifth Circuit. On January 20, 1984, the court of appeals affirmed the ICC's decision in all respects. *American Trucking Associations, Inc.* v. *ICC*, 722 F.2d 1243. The ATA and the Teamsters filed a petition for a writ of certiorari that was denied by this Court. No. 83-2117 (Oct. 29, 1984).

While the Fifth Circuit was considering the challenge to the agency's policy statement, the Denver & Rio Grande Western Railroad Company (D&RGW), a rail carrier, filed an application for a motor carrier license pursuant to the Ex parte No. MC-156 policy. Only one motor carrier, Tri-State Motor Transit Co. (Tri-State), opposed D&RGW's application. A Commission employee review board, relying upon the new Ex parte No. MC-156 policy, granted the application in a decision styled *The Denver & Rio Grande W.R.R.*, ICC Docket No. MC-166474 (Sub-No. 1) (App., *infra*, 11a-15a). The ATA and the Teamsters then sought to intervene in an appeal to the full Commission to assert that D&RGW's application should have been denied be-

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tries, the ICC opened a rulemaking proceeding to reevaluate its policies governing rail-motor operating rights. After full public participation (including the American Trucking Associations (ATA)). the Commission announced the end of the "special circumstances" doctrine in licensing proceedings. No longer would a rail-affiliated motor carrier, or a railroad, need to make such a showing to obtain unrestricted motor carrier operating authority. Ex parte No. MC-156.

cause the ICC's new policy was invalid. The Commission affirmed the review board (App., *infra*, 16a-21a) and refused to entertain the ATA's and the Teamsters' arguments, noting that those parties merely sought to relitigate the validity of Ex parte No. MC-156, which was then under consideration by the Fifth Circuit (App., *infra*, 18a). The ATA, the Teamsters, and Tri-State then petitioned for review under the Hobbs Act in the Eighth Circuit, now some 11 months after the Ex parte No. MC-156 rule had been issued. The only substantive issue raised was the validity of ICC's abolition of the special circumstances doctrine—the same question then pending before the Fifth Circuit.[4]

Prior to the filing of briefs in the Eighth Circuit, the Fifth Circuit affirmed Ex parte No. MC-156. *American Trucking Associations, Inc.* v. *ICC, supra.* The Commission and the United States then argued in the Eighth Circuit that the court lacked jurisdiction to review the substantive validity of the Ex parte No. MC-156 policy because the Hobbs Act limits a court's jurisdiction to petitions filed within 60 days of the issuance of an ICC order, and because the Fifth Circuit had exclusive jurisdiction to review the validity of the ICC policy.[5]

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[4] The ATA and the Teamsters also challenged the ICC's denial of their petition to intervene in the D&RGW administrative proceedings.

[5] The government also argued that petitioners were collaterally estopped from challenging the merits of the Commission's new policy in the guise of a challenge to the D&RGW licensing proceeding because the very same petitioners had previously, and unsuccessfully, challenged the policy in another court.

3. The court of appeals rejected the government's jurisdictional argument.[6] It held (App., *infra*, 4a n.2) (emphasis added) that the Hobbs Act "precludes an attack on the *procedure* by which the policy was adopted," but "does not bar judicial review of the *substantive validity* of the rule, even if more than sixty days have elapsed since its issuance." Having concluded that it had jurisdiction, the court of appeals proceeded to affirm the Ex parte No. MC-156 policy and to affirm the issuance of D&RGW's license.

REASONS FOR GRANTING THE PETITION

The decision below incorrectly expands the jurisdiction of the courts of appeals by disrupting the repose and centralized review procedure the Hobbs Act was designed to provide. The result will be substantial and wholly unnecessary burdens on the courts, the Hobbs Act agencies, and numerous other agencies with comparable review statutes. In addition, the decision below conflicts with decisions of the Second, Fifth, Seventh and District of Columbia Circuits. Accordingly, this case presents questions of recurring and practical importance that warrant this Court's review.

1. The purpose of the Hobbs Act is to ensure prompt, centralized and authoritative final review of agency rulemaking by a single court of appeals. See H.R. Rep. 93-1569, 93d Cong., 2d Sess. 9 (1974) ("The problem of multiple suits challenging a single

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[6] Although it apparently agreed with the government's contention that petitioners were collaterally estopped from attacking the substantive validity of the policy statement, the court refused to dispose of the petition for review on that basis (App., *infra*, 2a n.1).

ICC order in different locations before different courts, would disappear and with it the potential for disparity in results and nonuniformity. [The statute] vest[s] exclusive jurisdiction in the court of appeals in which the agency record is first filed.").[7] See also H.R. Rep. 2122, 81st Cong., 2d Sess. 4 (1950) (the Hobbs Act "represents an important improvement in judicial procedure—one that will make for economy and expedition in the disposition of a considerable class of business in the Federal courts"). Among the devices employed by Congress to achieve those objectives, two are of principal importance to this case: (1) the 60-day time limit on petitions for review, and (2) the vesting in the court "in which the record on review is filed" of "exclusive jurisdiction to make and enter * * * a judgment determining the validity of * * * the order of the agency" (28 U.S.C. 2349(a)). The statute also creates a transfer procedure so that all review of an agency order may be centralized in the court of first filing (or another court selected by that court, 28 U.S.C. 2112(a)). See *Western Coal Traffic League* v. *ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

The court of appeals' decision has a clear potential for mischief. By opening the door for parties to challenge administrative rules long after they were promulgated, the decision below poses a threat to the principle of finality, not only for the Hobbs Act agencies, but also for the numerous other federal agencies that operate under statutes with comparable review provisions. *E.g.*, EPA, 7 U.S.C. 136n(b); Board of Governors, Federal Reserve System, 12 U.S.C.

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[7] This legislative history relates to the 1975 amendment to the Hobbs Act that added ICC orders to the list of agency actions covered. Pub. L. No. 93-584, 88 Stat. 1917 *et seq.*

1848; SEC, 15 U.S.C. 77i, 78y(b); FDA, 21 U.S.C. 346a(i), 348(g); National Credit Union Administration, 12 U.S.C. 1786(j)(2); OSHA, 29 U.S.C. 655(f); Secretary of Labor, 30 U.S.C. 811(d); Federal Mine Safety and Health Review Commission, 30 U.S.C. 816(b). Once the prescribed statutory period has expired without a petition for review having been filed, an agency is entitled to rely on its new rule in future operations. Moreover, those who are regulated by the agencies, and who often make substantial investments in order to comply with new rules, should have some certainty to guide their conduct. The statutory scheme affords that repose; the Eighth Circuit's contrary view does not.[8]

The justification for insulating an administrative rule from belated judicial challenge is even more apparent where, as here, the agency has successfully defended its rule in a court of appeals.[9] In contrast

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[8] The decision below could encourage noncompliance with administrative rules. If firms know that if and when enforcement actions are brought against them, they will be free to challenge not only the application of the rule, but its validity as well, it will inevitably reduce any incentive to comply promptly. This is particularly so where compliance would generate substantial costs that could be deferred by delay. See, *e.g.*, *RSR Corp.* v. *Donovan*, 747 F.2d 294, 301-302 (5th Cir. 1984).

[9] Indeed, the present case is more compelling still because it involves parties who participated in the initial challenge in the Fifth Circuit. Two of the three petitioners in the Eighth Circuit, ATA and the Teamsters, were parties in the prior Fifth Circuit case. The third petitioner, Tri-State, is a member of the ATA and, as such, should be barred from relitigating the issue. See *Western Coal Traffic League* v. *ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984). Because the court of appeals did not resolve the collateral estoppel issue, and because in the more typical case subsequent challenges are made by new

to the orderly scheme Congress established, the court of appeals encourages tardy, duplicative litigation. Indeed, a literal reading of the Eighth Circuit's opinion suggests there would be nothing to stop these same parties—or anyone else—from launching exactly the same challenge the next time the ICC grants an application for rail-affiliated trucking operations. That would, of course, impose on the Commission, and on the courts of appeals, a burden Congress sought to avoid. Moreover, if that were the law, it would be more likely that a subsequent court could, upon reaching the merits, create a conflict among the circuits calling for resolution by this Court. That, too, is a result contrary to Congress's intent.[10]

It is, of course, immaterial that respondents' challenge was nominally to the D&RGW licensing order rather than to Ex parte No. MC-156. Their *sole* argument in opposition to the D&RGW order was that the Commission had invoked the policy announced in Ex parte No. MC-156. The attack was on the policy itself and merely recapitulated arguments that had been rejected by the Fifth Circuit. Accordingly, respondents' petition for review in the Eighth Circuit was in fact if not in form an attempt to obtain indirectly the untimely, repetitive review the Hobbs Act precluded them from seeking directly. See *Natural*

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parties, we do not raise the collateral estoppel issue as a separate question in this Court.

[10] The Hobbs Act created certiorari jurisdiction over agency orders in place of the direct appeal mechanism that existed previously. 28 U.S.C. 2350. The House Report stated that such a change "will save the members of the Supreme Court from wasting their energies on cases which are not important enough to call for their attention." H.R. Rep. 2122, *supra*, at 4.

Resources Defense Council v. *NRC*, 666 F.2d 595, 601-602 (D.C. Cir. 1981).

Nor can we appreciate the basis for the court of appeals' distinction between challenges to the "procedural" and "substantive" validity of agency rules, and its holding that the latter were not subject to the Hobbs Act's restrictions. The statutory language provides no support for such a distinction. Likewise, the legislative history gives no hint of a congressional intent to limit the carefully-crafted system for judicial review exclusively to "procedural" issues, while "substantive" challenges are subject to no such restrictions.

In addition, the procedure/substance distinction has no support in the case law. For example, in *Asphalt Roofing Manufacturing Ass'n* v. *ICC*, 567 F.2d 994, 1005 (D.C. Cir. 1977), the court squarely held that petitioners seeking review of certain ICC general rate increase decisions were barred from "actually challenging the validity of the Commission's rules" adopted earlier. And again in *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d 1025 (D.C. Cir. 1982),[11] petitioners challenged the substantive validity of previously-adopted regulations in the context of reviewing the agency's decision not to institute a hearing to revoke a construction permit. The court rejected petitioners' invitation to review the rules, noting that "[p]etitioners could have directly challenged the regulations after their promulgation, or they can petition the Commission to amend the regu-

[11] The District of Columbia Circuit overruled its decision in *Seacoast* on other grounds in *Lorion* v. *NRC*, 712 F.2d 1472 (1983), and that latter decision was itself reversed by this Court, No. 83-703 (Mar. 20, 1985). Neither decision in *Lorion* disturbs the proposition in *Seacoast* upon which we rely.

lations." 690 F.2d at 1029 n.14. It therefore held that Seacoast's petition for review "is not a proper mechanism for attacking regulations on substantive grounds." *Ibid.* See also *id.* at 1031. Accord, *Atchison, T. & S. F. Ry.* v. *ICC*, 687 F.2d 912, 918 (7th Cir. 1982).

2. Besides condoning untimely challenges to agency rules in violation of the 60-day limitation, the decision below is also at odds with the statutory scheme establishing "exclusive jurisdiction" in the court of appeals in which the record on review is filed. 28 U.S.C. 2349(a). Under the procedure prescribed in 28 U.S.C. 2346 and 2112, the court of appeals in which the first petition for review is filed has exclusive jurisdiction to pass on the validity of the challenged rule. With respect to Ex parte No. MC-156, that court was the Fifth Circuit, and, accordingly, no other court could entertain a like attack on the rule.

To be sure, the Eighth Circuit had jurisdiction to hear any claim that the new rule was misapplied in granting a certificate to D&RGW. But that was not the complaint. Respondents asked the Eighth Circuit to consider the same question already presented to the Fifth Circuit: the substantive validity of the new rule announced in Ex parte No. MC-156. That is what the Hobbs Act forbids.

3. The ruling below conflicts with decisions of other courts of appeals that have held the Hobbs Act's time limit to be jurisdictional. *Natural Resources Defense Council* v. *NRC*, 666 F.2d 595, 601-602 (D.C. Cir. 1981); *Geller* v. *FCC*, 610 F.2d 973, 977-978 (D.C. Cir. 1979); *New York* v. *United States*, 568 F.2d 887, 892 (2d Cir. 1977); *Chem-Haulers, Inc.* v. *United States*, 536 F.2d 610, 613-614 (5th Cir. 1976); *Microwave Communications, Inc.* v. *FCC*, 515 F.2d

385, 389-390 (D.C. Cir. 1974). See also *Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970).

The better view, and one more consistent with Congressional intent, was recently stated by the Fifth Circuit: an agency "should not be compelled to defend the same regulation against identical attacks in successive enforcement actions, when those challenges could and should have been asserted in the period for pre-enforcement review." *RSR Corp.* v. *Donovan*, 747 F.2d 294, 301 (1984).

The mechanism for judicial review prescribed in the Hobbs Act provides parties with due process (cf. *Yakus* v. *United States*, 321 U.S. 414, 431-443 (1944)), while ensuring the efficient operation of administrative agencies. Parties against whom subsequent enforcement proceedings are brought are not bereft of defenses: they may challenge the application of a rule to the particular facts and they may challenge the constitutionality of the *statute* upon which the rule is based (see *Johnson* v. *Robison*, 415 U.S. 361 (1974)). In addition, should circumstances warrant, parties may petition the agency to reconsider its rule in light of subsequent developments, such as recent legislation. *E.g.*, *Investment Co. Institute* v. *Board of Governors*, 551 F.2d 1270, 1281-1282 (D.C. Cir. 1977).

All that the Hobbs Act precludes are untimely challenges to the validity of the rule itself, challenges that could and should be brought within 60 days in the court of appeals with exclusive jurisdiction. Any other procedural regime would promote delay and piecemeal litigation—all to the detriment of the finality and certainty Congress intended.

4. In this case, the Eighth Circuit ultimately rejected respondents' substantive contentions and upheld the agency orders. It can therefore be expected that respondents will urge the Court not to grant our petition because the government generally prevailed in the court of appeals.[12]

The judgment of the court of appeals—"affirming" the Commission—was incorrect. It should have entered a dismissal of the petition for lack of jurisdiction. Nor is the change we seek in the judgment solely academic. Even in this case, there is a risk of further improper proceedings if the jurisdictional holding remains undisturbed, *i.e.*, review of the *merits* by this Court on a petition filed by respondents. Moreover, if the ruling of the court below stands, there is the real prospect that other courts of appeals will feel free to entertain challenges to the substantive validity of this same ICC rule.[13] And, for the indefinite future—

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[12] This Court has jurisdiction to grant this petition for a writ of certiorari. The present case is indistinguishable in principle from *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980) and *NRC* v. *Lorion*, No. 83-1031 (Mar. 20, 1985), in which the Court granted certiorari although the petitioners had "prevailed" in the courts below, in that the court had rebuffed a challenge to an administrative action, albeit on the erroneous ground that it lacked jurisdiction. See 28 U.S.C. 1254(1) (petition may be filed by "any party" in lower court); *Director, OWC* v. *Perini North River Associates*, 459 U.S. 297, 304 & n.13 (1983); *United States* v. *Nixon*, 418 U.S. 683, 692 & n.7 (1974); see also *Menominee Tribe* v. *United States*, 391 U.S. 404, 407 (1968) (petitioners as well as the government sought affirmance).

[13] See *Texas* v. *United States*, 730 F.2d 409, 415 (1984), amended on reh'g, 749 F.2d 1144 (5th Cir. 1985); cf. *Arizona Public Service Co.* v. *United States*, 742 F.2d 644, 648-649 (D.C. Cir. 1984); *Montana* v. *Clark*, 749 F.2d 740, 744 n.8 (D.C. Cir. 1984).

until every court of appeals has sustained the rule—uncertainty will prevail and litigation will abound. The resulting burdens, for the government and for the courts, warrant this Court's intervention without further delay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1985

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-2564

TRI-STATE MOTOR TRANSIT CO., and AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INTERVENOR/RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERVENORS

On Petition for Review of the Order of the Interstate Commerce Commission

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Submitted: May 17, 1984

Filed: August 3, 1984

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

LAY, Chief Judge.

Tri-State Motor Transit Co. (Tri-State) contested the application before the Interstate Commerce Commission (ICC) of unrestricted motor carrier operations for the Denver and Rio Grande Western Railroad Co. American Trucking Associations, Inc. (ATA) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) unsuccessfully sought to intervene before the ICC in opposition of the application. Tri-State, ATA, and the Teamsters now ask this court to set aside the ICC's grant to Denver/Rio Grande of unrestricted motor carrier operations. We affirm the order of the ICC.[1]

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[1] ICC and Denver/Rio Grande argue that Tri-State et al. are estopped from challenging the Commission's order on the basis of collateral estoppel. ATA and the Teamsters very well may be estopped from such a challenge based on their participation in a similar challenge of the same issue before the Fifth Circuit. *American Trucking Ass'ns, Inc. v. I.C.C.*, 722 F.2d 1243 (5th Cir. 1984). Additionally, Tri-State may be estopped because of its privity with ATA; Tri-State is a member of the Association. *Western Coal Traffic League v. I.C.C.*, Nos. 82-1837 et al., at 7 (D.C. Cir. May 22, 1984), supports this view. Since we approve the grant of the certificate, we need not pass on the estoppel argument.

We also find no abuse of discretion in the ICC's denial of intervention for ATA and the Teamsters in the ICC proceeding. The decision whether to grant a petition to intervene before the ICC is governed by statute, 49 U.S.C. § 10922(b)(7), and by regulation, 49 C.F.R. § 1112.4. The latter states that intervention "may" be granted so long as it does not unduly disrupt or broaden the issues raised in the proceeding. In denying leave to intervene, the ICC stated:

> The ATA and Teamsters had the opportunity to appear when this proceeding was commenced and prior to the decision by the Review Board. They did not choose to

The unrestricted motor carrier operations granted to Denver/Rio Grande allows the railroad to engage in unlimited trucking operations. Historically, the ICC restricted rail-affiliated motor carriers to operations "auxiliary to or supplemental of" the rail operations of the company, unless the particular rail-affiliated trucking company could demonstrate special circumstances justifying an exception to the general rule. This general rule and exception thereto was known as the "special circumstances doctrine," and required that motor carrier operating authority for railroads be restricted to incidental rail service unless unrestricted authority was required to fulfill a compelling public need for service not being offered by independent motor carriers. The purpose of the special circumstances doctrine was to prevent rail domination of motor carrier markets.

In 1982 the ICC abrogated the special circumstances doctrine in Ex Parte No. MC-156, *Application for Motor Carrier Operating Authority by Railroads and Rail Affiliates*, 132 M.C.C. 978 (1982). This decision was made in light of amendments to the Interstate Commerce Act—the Motor Carrier Act of

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do so. Furthermore, the apparent purpose of intervening in this proceeding is to attack the validity of the elimination of the "special circumstances" doctrine. This would unduly broaden the issues raised in this proceeding contrary to our rules of practice [49 C.F.R. 1112.4] and in effect constitutes a collateral attack on Ex Parte No. MC-156. As such, petitioners raise no issues that can properly be considered here. We will deny the petitions of ATA and Teamsters to intervene. Petitioners' interests will not be prejudiced inasmuch as their concerns will be addressed by the Court of Appeals [for the Fifth Circuit].

Interstate Commerce Commission Decision No. MC-166474 (Sub-No. 1) (Nov. 8, 1983). We find no error in this ruling.

1980 and the Staggers Rail Act of 1980. The ICC concluded that, in light of the 1980 amendments, a rail-affiliated trucking company no longer needs to prove special circumstances to justify an unrestricted grant of authority. ATA and the Teamsters unsuccessfully challenged the ICC decision before the Fifth Circuit. *American Trucking Associations v. I.C.C.*, 722 F.2d 1243 (5th Cir. 1984). The Fifth Circuit concluded that the ICC was within its authority when it abolished the special circumstances doctrine, noting especially the changes in the trucking and rail industries and the Interstate Commerce Act.

On appeal to this court, Tri-State, ATA, and the Teamsters argue that the Interstate Commerce Act precludes the ICC from removing all special limitations on the licensing of railroads to engage in motor transportation. Therefore, contends Tri-State et al., the ICC was without authority to remove the special circumstances doctrine from its licensing procedure, and the Fifth Circuit was in error in affirming the ICC decision.[2]

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[2] The ICC argues that, considering the Fifth Circuit's affirmance of Ex Parte No. MC-156, this court does not have jurisdiction to review a subsequent challenge on the substantive validity of an agency's rules. This argument is based on the Hobbs Act, which provides that a party aggrieved by a rule, regulation, or final order of the ICC must file a petition for judicial review within sixty days. 28 U.S.C. §§ 2342, 2344. We agree that this rule now precludes an attack on the procedure by which the policy was adopted. However, we hold that the Hobbs Act does not bar judicial review on the substantive validity of the rule, even if more than sixty days have elapsed since its issuance. As the District of Columbia and Fifth Circuits have noted, "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny

The Fifth Circuit extensively reviewed the history of the special circumstances doctrine in its opinion. *See* 722 F.2d at 1244-47. The central issue there, and here, is whether the special circumstances doctrine, which was created by the ICC, has been recognized by the Supreme Court to be statutorily required. Prior to the passage of the Motor Carrier Act of 1935, the trucking industry was economically unstable and dominated by ease of competitive entry. The special circumstances rule arose from the Act itself and was intended to protect the motor transportation system from over competition.

The explicit Congressional restriction on rail-affiliated trucking companies was the enactment of high barriers to rail companies' *acquisition* of trucking companies. Motor Carrier Act of 1935, § 213(a), currently at 49 U.S.C. § 11344(c).[3] The implicit Congressional restriction was recognizing and preserving "the inherent advantages" of each mode of transportation. Motor Carriers Act of 1935, § 202 (a), currently at 49 U.S.C. § 10101(a). In contrast

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many parties ultimately affected by a rule an opportunity to question its validity." *Texas v. United States*, 730 F.2d 409, 415 (5th Cir. 1984) (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)).

[3] Section 11344(c) provides in pertinent part:

> When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transportation involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition.

to the acquisition provisions, the licensing provisions did not provide for any restrictions on rail companies' operations of trucking companies. However, the ICC interpreted the acquisition provisions of § 11344 (c) to mean that not only could railroads not acquire, but that they could not operate as unrestricted trucking companies. The ICC additionally interpreted the National Transportation Policy's requirement of preserving the inherent advantages of each mode as support for protection of the infant trucking industry from the railroads. In *I.C.C. v. Parker*, 326 U.S. 60 (1945), and later in *United States v. Rock Island Co.*, 340 U.S. 419 (1951), the Supreme Court affirmed the ICC's power to restrict the licensing of rail-affiliated trucking companies.

The ICC modified its restrictions on the licensing of trucking operations for rail companies in *Rock Island Motor Transit Co. Common Carriers Application*, 63 M.C.C. 91 (1954). The ICC held that unrestricted authority could be granted to a rail-affiliated trucking company if the rail affiliate could prove that the grant would not restrain competition and that the public interest required the proposed service. This policy was the "special circumstances" exception and the Supreme Court affirmed its use in *American Trucking Associations v. United States*, 355 U.S. 141 (1957). The Supreme Court noted that the licensing and acquisitions sections were interpretive brothers, and stated that "the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.'" *Id.* at 151-52.

In *American Trucking Associations v. United States*, 364 U.S. 1 (1960), the ICC had granted operating licenses to a trucking company that was a wholly owned subsidiary of a railroad. ATA chal-

lenged the grant, claiming that the ICC did not properly apply the special circumstances doctrine. The Supreme Court agreed, finding that "[b]oth the Commission and this Court have recognized that Congress has expressed a strong general policy against railroad invasion of the motor field," *id.* at 6, and concluding that the ICC had deviated from this policy by granting operating authority to a railroad subsidiary without finding special circumstances. *Id.* at 15.

Tri-State now urges that the principles of *American Trucking* are violated by the ICC's grant of operating licenses to the Denver/Rio Grande. We must disagree. The ICC was charged by the Supreme Court with applying the Act "as a whole." We believe that when the Act is read as a whole, including the 1980 amendments, the ICC had proper authority to find that the special circumstances doctrine should no longer be recognized.

Specifically, the amendments established "a new Federal policy which is designed to promote a competitive and efficient motor carrier industry." H.R. Rep. No. 1069, 96th Cong., 2d sess. 14 (1980). The legislation mandated eased regulatory entry requirements in order to increase "opportunities for new carriers to get into the trucking business and for existing carriers to expand their services." *Id.* at 3. However, Congress found that "today most transportation is competitive and many Government regulations affecting railroads have become unnecessary and inefficient." H.R. Rep. No. 1430, 96th Cong., 2d sess. 79 (1980). *See generally American Trucking Associations v. I.C.C.*, 722 F.2d 1243, 1249-52 (5th Cir. 1984) (detailing the deregulatory approach of the 1980 amendments). We therefore agree with the ICC and the Fifth Circuit *ATA* decision, *id.*, that the

showing required under the special circumstances doctrine of compelling necessity for unrestricted authority for rail-affiliated motor carriers has no place in the procompetitive licensing regulations of the revised Interstate Commerce Act.

For the above reasons, the decision of the ICC is affirmed.

A true copy:

Attest:

Clerk, U.S. Court of
Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

No. 83-2564

TRI STATE MOTOR TRANSIT CO., ET AL, PETITIONERS

vs.

ICC & U.S.A., RESPONDENTS

Petition for Review of Order of
Interstate Commerce Commission

JUDGMENT

This cause came to be submitted on the record from the Interstate Commerce Commission and briefs of the parties.

After consideration, it is ordered and adjudged that the judgment of the Interstate Commerce Commission, is hereby, affirmed in accordance with the opinion of this Court.

August 3, 1984

A true copy:

Attest:

/s/ Robert D. St. Vrain
Clerk,
U.S. Court of Appeals,
Eighth Circuit. 11/7/84

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 83-2564.

TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,
PETITIONERS

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of Order of the
Interstate Commerce Commission

Respondents' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 26, 1984

APPENDIX D

Service Date

Sept. 8, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-166474 (Sub-No. 1)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY EXTENSION—
POINTS IN THE UNITED STATES
(Denver, CO)

Decided: August 26, 1983

Applicant seeks a certificate authorizing the operations described in the appendix. The evidence has been considered under the modified procedure. Tri-State Motor Transit Co., opposes the application.

Applicant holds no existing authority from this Commission. It argues that a grant of the proposed authority will enhance the competitive environment and will promote a safe and sound intermodal transportation system.

The application is supported by 27 shippers. They are The John Sexton Co., Morton Salt Division of Morton Thiokol, Inc., The Quaker Oats Company, and Gee Co., all of Chicago, IL; Packaging Corporation of America of Evanston, IL; Grain Processing Corporation of Muscatine, IA; F. Korbel and Brothers of Guerneville, CA; American Timber Products, Inc., of Oklahoma City, OK; Nobel/Sysco Food Services Co., Association Grocers of Colorado, Inc., Keebler Com-

pany and McKesson Wine and Spirits Co., all of Denver Co.; American Excelsior Corp. of Arlington, TX; Alpine Lumber Co. and Husky Oil Company of Englewood, CO; Pacific Coast Producer's of Santa Clara, CA; Slaughter Brothers, Inc. and Lennox Industries, Inc., of Dallas, TX; Alamaden Vineyards of San Jose, CA; The Dorris Lumber & Mouldings Co. and Western Bark Sales, Inc., of Sacramento, CA; Trammell Crow Distributions Corporation and National Distribution Systems of Clearfield, UT; Gonzalez & Company, Inc., of Gonzalez, CA; Gerber Products Company of Fremont, MI; American Forest Products Co., and United Vinters Inc., of San Francisco, CA. Collectively, shippers require service on a wide variety of commodities including air conditioners, foods and food products, boxes, pulpwood and paper products, cleaning compounds, plastic articles, wines, lumber and lumber products and appliances. All of the shippers have described the commodities to be transported, the volume to be tendered applicant, and problems with existing service. Representative origin and destination points are shown by most of the shippers. Others indicate customers are located throughout the 48 contiguous States. A number of shippers require insulated equipment, while several require high cube van equipment. A large number of shippers support the instant application in order to shift transportation services from rail to motor common carriage. Shippers currently using motor common carriers generally express a need to have additional equipment available and an opportunity to use a carrier with a more competitive rate structure.

Tri-State holds authority to transport general commodities between points in the United States, operates 1,164 tractors and 2,585 trailers, and contends that

a grant of this application would have a detrimental effect upon its operations. Tri-State, in 1982, generated approximately $64 million in revenue which assertedly would be subject to diversion by a grant of the application. Protestant claims that the diversion of any meaningful portion of this traffic would have a disastrous effect upon its operations; it suffered a loss of $799.00 in 1982. Tri-State notes that its traffic was down 20 percent in 1982, that it currently had idle equipment throughout its system, and it attributes this decrease in business to the more liberal entry policy of the Commission. Further diversion and lack of traffic, we are told, will result in further closing of terminals and additional layoffs of personnel. It believes that the application should be denied in view of applicant's failure to provide "special circumstances".

On the record before us, we find that applicant has met its threshold burden. A representative showing is all that is required, and the specific commodities, origins and destinations named are sufficiently representative of the authority sought by the 27 supporting shippers.

Tri-State has not shown that a grant of authority to applicant would harm its overall operations to an extent injurious to the public interest. So long as it provides reasonable service and competitive rates, there is no reason to assume that its traffic would be diverted by applicant. Furthermore, Tri-State has done little to show that a grant of the application would be inconsistent with the public convenience and necessity, merely citing potentially divertible traffic and revenues from increased competition. This factor, in and of itself, cannot, under the Motor Carrier Act of 1980, be made the basis for a denial

of authority otherwise adequately supported by the record.

Finally, contrary to protestant's contentions, a railroad need no longer demonstrate "special circumstances" in order to obtain unrestricted motor carrier authority. *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (1982).

We find:

Performance by applicant of the service described in the appendix will serve a useful public purpose, responsive to a public demand or need. Applicant is fit, willing and able properly to perform the granted service and to conform to statutory and administrative requirements. This action will not significantly affect either the quality of the human environment or conservation of energy resources. An appropriate certificate should be granted.

It is ordered:

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a *certificate* and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

Compliance with these requirements must be made within 90 days after the date of service of this decision or the grant of authority shall be void.

By the Commission, the Review Board, Members Carleton, Parker, and Krock.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii).

APPENDIX E

Service Date

Nov. 15, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-166474 (Sub-No. 1)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, EXTENSION—POINTS IN THE UNITED STATES (Denver, CO)

Decided: November 8, 1983

We have considered the application and the record in this proceeding, the appeal filed by protestant Tri-State Motor Transit Co., the petitions to intervene filed by American Trucking Associations, Inc. (ATA) and the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America (Teamsters), and applicant's reply.

The ATA and Teamsters here renew their challenge to the legality of the elimination of the "special circumstances" doctrine in Ex Parte No. MC-156, *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (1982).[1] This issue is pending before the

[1] The "special circumstances" doctrine allowed a departure from the requirement of imposing auxillary-to-rail restrictions on motor carrier authority issued to railroads or rail affiliates in licensing proceedings. The doctrine allowed issuance of unrestricted authority where the rail affiliated applicant could show a "compelling need" for its service by demonstrating (1) that a grant of unrestricted authority would not

United States Court of Appeals for the Fifth Circuit in *American Trucking Associations, et al. v. I.C.C., et al.*, No. 83-4039. They contend that they should be allowed to intervene in this proceeding in order to "maintain the integrity of the licensing procedures" of this Commission and compliance with "the regulatory scheme set forth by Congress in the Interstate Commerce Act."

The ATA and Teamsters had the opportunity to appear when this proceeding was commenced and prior to the decision by the Review Board. They did not choose to do so. Furthermore, the apparent purpose of intervening in this proceeding is to attack the validity of the elimination of the "special circumstances" doctrine. This would unduly broaden the issues raised in this proceeding contrary to our rules of practice [49 C.F.R. 1112.4.] and in effect constitutes a collateral attack on Ex Parte No. MC-156. As such, petitioners raise no issues that can properly be considered here. We will deny the petitions of ATA and Teamsters to intervene. Petitioners' interests will not be prejudiced inasmuch as their concerns will be addressed by the Court of Appeals.

By decision served September 8, 1983, the Review Board granted applicant's request to transport general commodities (except classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii). The Board held that a railroad need no longer demonstrate "special circumstances" in order

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result in undue restraint of competition, and (2) that the public interest requires the proposed operation which was not being furnished by independent motor carriers. Ex Parte No. MC-156, *supra*, at 981. The doctrine was eliminated to make it easier for railroads and rail affiliates to obtain unrestricted motor carrier authority.

to obtain unrestricted motor carrier authority, citing Ex Parte No. MC-156, *supra.*

Protestant does not challenge whether applicant has met the criteria of 49 U.S.C. 10922 or established a need for the proposed service. Rather, it contends that the authority should not be granted since applicant failed to establish "special circumstances." Protestant is concerned that the granting of this application will result in the filing of similar applications by other rail carriers and their affiliates while the review of Ex Parte No. MC-156 is pending in Court. It requests us to (1) issue a notice or order that, pending final decision by the Court, applications filed under Ex Parte No. MC-156 will be held in abeyance or not accepted for filing until further order; or (2) attach a condition limiting any certificates granted in those proceedings to the lesser of (a) a term of one year from its issuance, or (b) reconsideration of the proceeding based on the final decision by the Court.

The Fifth Circuit Court of Appeals has not issued a stay of the rules in Ex Parte No. MC-156 pending its reivew of that proceeding. Accordingly, there is no legal impediment to rendering a decision in this application proceeding. We see no valid reason to either hold this case or other similar cases in abeyance or to impose a condition on the certificates to be issued. Ex Parte No. MC-156 is quite clear that a railroad need no longer demonstrate "special circumstances." Therefore, we will not reverse the Review Board decision. For reasons stated above protestant's attack on the validity of the elimination of the "special circumstances" doctrine constitutes an inappropriate issue to consider here.

The Review Board correctly found that applicant has established a need for the proposed service. The

application is supported by 27 shippers which require service for a wide variety of commodities throughout the 48 contiguous states. Those using motor carriers expressed a need to have more service available. Only one protestant opposed the application. Protestant did not show that a grant of the application would be inconsistent with the public convenience and necessity.

The grant of the requested authority will allow improved and innovative service through the combined use of piggyback, motor, and rail service by one carrier. In addition to promoting intermodal service, the granted authority should afford shippers a new and efficient service option.

It is ordered:

The petitions to intervene of the American Trucking Associations, Inc., and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America are denied.

Protestant's appeal is denied because the findings of the Review Board, are in accordance with the evidence and the applicable law.

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a certificate and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

Compliance with these requirements must be made within 90 days after the date of service of this decision or the grant of authority shall be void.

This decision will take effect 25 days from its date of service.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Andre, Taylor, and Sterrett. Commissioner Taylor is assigned to this Division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii).

APPENDIX F

Title 28, United States Code

CHAPTER 158—ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2341. Definitions

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration.

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11190(i)(2) of title 49, United States Code.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

§ 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

§ 2344. Review of orders; time; notice; contents of of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules.

Any party aggrieved by the final order may within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

§ 2345. Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.

§ 2346. Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

§ 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by

the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counter evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the

additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

§2348. Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

§ 2349. Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply.

§ 2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(3) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

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